85-2114

Supreme Court, U.S.
FILED
JUN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

LAWRENCE BELL, WILBERT BELL,
KERNAN PERKINS and GEORGE HARDY
Petitioners

v.

DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, EAST LOUISIANA
STATE HOSPITAL and DEPARTMENT OF
STATE CIVIL SERVICE FOR THE
STATE OF LOUISIANA
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

J. ARTHUR SMITH, III
524 France Street
Baton Rouge, LA 70802
(504) 383-7716

Counsel to Petitioners

351P

QUESTION PRESENTED FOR REVIEW

Whether minimum due process of law under the Fourteenth Amendment to the United States Constitution requires prior notice and an informal opportunity to be heard where the property interests of tenured state civil service employees in retaining their previous levels of earnings are adversely affected by the non-disciplinary actions of a state department of civil service.

PARTIES

The caption identifies all the parties.

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OPINIONS BELOW

The opinion of the Louisiana State Civil Service Commission is unreported. It is reproduced in the Appendix hereto. The opinion of the Court of Appeal for the First Circuit of Louisiana is reported at 472 So.2d 235. It is also reproduced in the Appendix hereto. The opinion of the Supreme Court for the State of Louisiana is reported at 483 So.2d 945. It is also reproduced in the Appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The opinion of the Louisiana Supreme Court was

entered on February 24, 1986. A petition for rehearing was timely filed but denied on March 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

That portion of the Fourteenth Amendment to the United States Constitution which provides that no State shall deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

This is a civil service case brought by four (4) permanent classified State employees from the partial dismissal by the Louisiana State

Civil Service Commission of their appeal on a Motion for Summary Disposition which was treated by the Commission as Motion to Dismiss for Failure to State a Claim upon which Relief May Be Granted.

Petitioners are long-time employees of the State of Louisiana. Their appeal to the State Civil Service Commission alleged that on December 23, 1982, they received written notice that summarily and henceforth they held the positions of "Laborer-Utility" rather than their previous positions of "Equipment-Operators." It was also alleged that these reallocations, if

allowed to be effectuated, will result in substantial reductions of the salaries these men have been earning for many years, to the extent of approximately one-third (1/3) of their salaries. It was also alleged that their salaries had been summarily frozen as of the date of the reallocations. Petitioners asserted several state law grounds for appeal and the federal ground that the procedures utilized to effectuate these reallocations violated minimal procedural due process. In support of this contention, petitioners specifically alleged that they received no prior notice of the

reallocations and that the civil service director refused petitioners' requests that they be allowed to respond either orally or in writing to the reallocations.

In response, the Department of Civil Service filed a Motion for Summary Disposition. This Motion was, for the most part, granted by the Commission on February 13, 1984.[1] The State Civil Service Commission specifically addressed the

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1. The only hearing of any type which was ever held was a hearing on the question of whether the civil service director violated the Commission's rules.

federal due process contentions. (App. pp. 128 et. fol.)

Thereafter, Petitioners perfected an appeal. On June 25, 1985 a majority of a sharply divided Court issued an opinion affirming the decision of the Commission and specifically addressing the federal due process contentions.(App. pp. 66 et. fol.)

A writ of review was subsequently granted by the Louisiana Supreme Court. On February 24, 1986, a sharply divided Louisiana Supreme Court affirmed, again specifically deciding the federal due process contentions. The State Supreme Court concluded: "In a

reallocation determination an employee is not entitled to either pre-reallocation notice or an opportunity to be heard."(App. p. 24)

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

Introduction

We respectfully submit that the above holding of the Louisiana Supreme Court contravenes well settled principles of federal constitutional law. Pre-deprivation notice and "meaningful opportunity to present their case" in an informal hearing are the minimum requirements of procedural due

process. Matthews v. Eldridge, 424 U.S. 319 (1976).

Petitioners are Constitutionally Entitled to Prior Notice

In Greene v. Lindsey, 456 U.S. 444 (1982) this Court held at 449:

> "The fundamental requisite of due process of law is the opportunity to be heard...And the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

Nevertheless, the Louisiana Supreme Court held that petitioners are entitled to no prior notice whatsoever. This holding is, we respectfully submit, a dramatic departure

from settled due process jurisprudence.

Petitioners Are, at the Minimum, Entitled to an Informal Opportunity to Respond

In Goss v. Lopez, 419 U.S. 565 (1975) this Court held that "At the very minimum" a person with a property interest must be given "some kind of hearing"..."preceded by notice." See also Parratt v. Taylor, 451 U.S. 527 (1981); Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975); and Eguia v. Tompkins, 756 F.2d 1130 (5th Cir. 1985) at 1139. In Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985), this Court held that due process requires some pre-

deprivation "opportunity to respond" before adverse administrative action is taken affecting a permanent civil service employee. Indeed, the Court noted:

> "An essential principle of due process is that a deprivation of life, liberty, or property be preceeded by notice and opportunity for hearing appropriate to the nature of the case...We have described the 'root requirement' of the Due Process Clause as being that an individual be given an opportunity for a hearing before he is deprived of any significant property interests...The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process

> requirement...(Emphasis supplied)

Furthermore, the holding of the Louisiana Supreme Court in the instant case is in direct conflict with the holding of Stana v. School District of City of Pittsburgh, 775 F.2d 122 (3rd Cir. 1985). In the latter case, retention on an eligibility list was a requirement for public employment in the Pittsburgh School District. Since Stana was removed from this eligibility list, for non-disciplinary reasons, without prior notice or an opportunity to be heard, the Court of Appeals for the Third Circuit held that her rights to

procedural due process had been violated.

Of course, the type of hearing which is constitutionally required, formal or informal, depends upon an analysis of the "nature of the case." Cleveland Board of Education v. Loudermill, supra, at 1493. This requires a balancing of the competing interests at stake. "These are the private interests in retaining employment, the governmental interests in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an

erroneous termination."[2] Id., at 1494 We respectfully submit that the proper striking of the balance in the instant case compels a conclusion that petitioners are constitutionally entitled, at the minimum, to an informal opportunity to respond.

The Private Interests

The Louisiana Supreme Court correctly held that:

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2. It deserves emphasis that the resolutory question in Matthews v. Eldridge, supra, and its progeny is not whether the persons whose property interests are to be affected are entitled to any "opportunity to present their case" but rather whether the persons are entitled to a full blown trial-type hearing or an informal opportunity to respond.

> "[I]t is clear that tenure or classified civil service status is a property right within the meaning of Article 1, Section 2 of our Constitution, a prerequisite to a due process challenge. Delta Bank and Trust Company v, Lassiter, 383 So.2d 330 (1980). Under our constitution and the Civil Service Rules, an employee who has gained classified permanent civil service status has an entitlement to his position, since he has already received the position, and applicable law guarantees him continued employment, save for some exceptions (i.e. disciplinary sanctions for cause).[Citations omitted] Having concluded that a classified permanent employee enjoys a property right in maintaining his status, it is axiomatic that his position may not be changed or abolished without due process of law. (App. pp. 25-27)

As noted by the Federal Court in Eguia v. Tompkins, supra, at 1138-1139:

> "There can be no doubt that the plaintiff's interest in his salary and expense reimbursement is a property interest protected by the Constitution...Mr. Eguia's interest in the receipt of his salary is no less substantial than the property interests protected in Sniadach and Fuentes"

In Eguia v. Tompkins, supra, the Court had no difficulty in holding that Mr. Eguia had a property interest in the receipt of one (1) paycheck. In Prince v. City of Junction, Texas, 711 F.2d 582 (5th Cir. 1983) the Court noted at 589: "Whether a junk car has little or great value, it is constitutionally protected." In Parratt v. Taylor, supra, this Court held that a prisoner's hobby kit fell within the definition of

property. Clearly, Petitioners in the instant case have substantial property interests in maintaining their job status and attained levels of earnings.

The Governmental Interests

The Louisiana Supreme Court made the observation, without the benefit of any evidence, that: "were an employee entitled to notice and a hearing in every reallocation, maintenance of a uniform pay system would be jeopardized." (App. p. 37) This observation was not even suggested by counsel for the Department of Civil Service.

We respectfully submit that procedural fairness in

reallocations would not jeopardize the uniform pay system. In Cleveland Board of Education v. Loudermill, supra, at 1495, the Court noted that " the employer shares the employee's interest in avoiding disruption and erroneous decisions." An analogous situation obtains in reallocations. The Department of Civil Service has no interest in improper reallocations based on inaccurate facts. Indeed, we respectfully submit that the Department shares the employee's interest in avoiding erroneous reallocations. It is simply wrong, we respectfully submit, for the Louisiana Supreme Court,

without the benefit of any evidence or specific demonstration from the Department of Civil Service, to conclude that procedural fairness in reallocations would jeopardize the uniform pay system. Basic constitutional protections should not be eviscerated in the interest of serving an overriding governmental interest without, at least, a clear showing that such a governmental interest does, in fact, exist.

In the same vein, there is nothing in the record of this case showing that any undue fiscal or administrative burdens would result if employees were

given prior notice of reallocations and an informal opportunity to respond. Indeed, the Louisiana Civil Service Commission already has in place elaborate notice and hearing mechanisms with a staff of competent attorney-referees. It is a good and fair system that is used to provide a full blown trial-type hearing in <u>every</u> other type of personnel action (from reprimands to suspensions to terminations) and there is no reason whatsoever why the same system could not be easily used to provide an informal opportunity for an employee facing reallocation to respond.

The Risk of an Erroneous Reallocation

The Louisiana Supreme Court held, without the benefit of any evidence, that:

> "[a reallocation] does not center on any facts surrounding the employee whatsoever. A reallocation is a result of an internal decision made by the director after reviewing the job duties of an employee and comparing them with previously outlined job classifications. In this regard, there is little chance for an erroneous decision."(App. p. 32)

This finding is not only not based on any evidence, it is also wrong.

In the first place, there are facts of issue in this case and they have been properly put at issue by petitioners' appeal

to the Commission. This is not a case where the facts are clear and it is legally erroneous for the State Court to conclude, on the face of the pleadings, to the contrary. Surely, an administrative official can be wrong about the work an employee actually performs, as he can be wrong about any other factual matter, and it is erroneous for a Court to conclusively presume to the contrary.

In Cleveland Board of Education v. Loudermill, supra, this Court held at 1494:

> "[S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision."

Moreover, the Louisiana Supreme Court recognized that:

> "It is when the focus of the reallocation changes to considerations of the employee (i.e. allegations of discrimination), or where there are allegations of a Rules violation, that notice and an opportunity to be heard crystalizes into something meaningful. Article 1, § 2 would require that at this point there be these minimal procedural protections." (App. p. 35)

There are, in this case, both allegations of considerations of the employee as well as allegations of a rule violation. Indeed, petitioners have alleged that:

1. They were singled out for reallocation due to the personal animosity of their supervisor;

2. The only employees whose positions were reallocated were those who worked for this particular supervisor; and

3. They are the only hospital employees whose salaries are being reduced.

Therefore, these allegations of the appeal letter certainly focus on the individual employees and crystalize notice and opportunity to be heard into something meaningful.

Furthermore, in Cleveland Board of Education v. Loudermill, supra, this Court held at 1494:

> "Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to

> invoke the discretion of the decision maker is likely to be before the termination takes place...[T]he termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success."

The Court further explained at 1494 n. 8:

> "The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing effective notice and informal hearing permitting the [employee] to give his version of events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect...[H]is discretion will be more informed and we think the risk of error substantially reduced."

Thus, even if the facts in this case were clear, and they certainly are not, petitioners are still entitled to an informal opportunity to respond with regard to the appropriateness or necessity for the reallocations.

Post-Deprivation Proceedings in this Case

In Cleveland Board of Eduation v. Loudermill, supra, this Court held:

> "The existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures (1496, n.12)...Our holding rests in part on the provisions in Ohio law for a full post-termination hearing."(1496)

Since Ohio law provided for a full administrative hearing and

judicial review, this Court held that only notice and an informal opportunity to respond were required by the due process clause.

In the instant case, however, petitioners were not given the right to any post-deprivation formal hearing concerning either the facts upon which the reallocations were based or the necessity or appropriateness of the reallocations.

The Louisiana Supreme Court noted that "in some instances due process is fulfilled by a 'post-deprivation' hearing." (App. p. 37) This proposition is correct, as far as it goes, but

it is subject to an important qualification: the opportunity to be heard must be "at a meaningful time and in a meaningful manner." Barry v. Barchi, 443 U.S. 55 (1979). The limited rule violation hearing held in this case fulfilled neither requirement. In the first place, it cannot be said on this record that the hearing of July 10, 1984 (approximately one (1) year and 8 months after the reallocations of October 11, 1982) was timely as a matter of law. Cf Eguia v. Tompkins, supra, at 1140, where the Court could not agree that a 14 month delay was timely as a matter of law. Secondly, the limited rule

violation hearing was not held in a meaningful manner because:

(1) It was limited to the question of whether there was a rule violation and did not consider either the facts alleged by Petitioners in their appeal letter, the facts upon which the reallocations were based, or the necessity or appropriateness of the reallocations;

(2) The Commission had already pre-judged the question as to who should have the final decision on the reallocations in this case. Indeed, it had expressly concluded: "The Director is the logical person to make the final allocation decision." (App. p.143)

(3) There was no de novo hearing but petitioners were put in the impossible position of appellants with the burden of persuading the

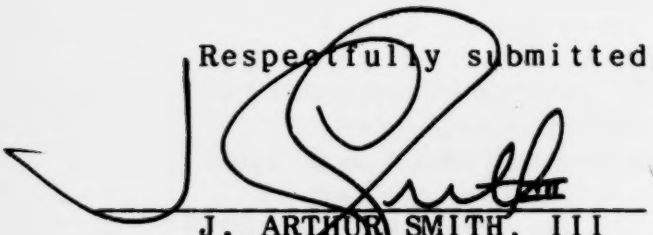
Commission that its Director had violated its own rules and overriding a well-nigh conclusive presumption of correctness of the Director's decision.

Conclusion

We respectfuly conclude that a person with a property right to be affected is entitled to prior notice and an opportunity to respond. The opportunity to respond does not necessarily have to be a full blown trial type hearing, but it is wrong and legally incorrect to hold that a permanent tenured civil service employee may be deprived of a substantial portion of his hard earned wages by procedures which are totally lacking in minimal due process.

We therefore respectfully conclude that this Petition for Writ of Certiorari should be granted.

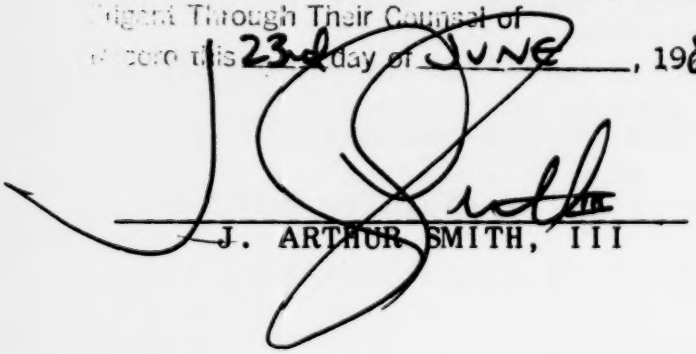
Respectfully submitted,



J. ARTHUR SMITH, III
524 France Street
Baton Rouge, LA 70802
(504) 383-7716

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing have been mailed, Postage prepaid, UNITED STATES MAIL, to all parties Litigant Through Their Counsel of Record this 23rd day of JUNE, 1986.



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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

APPENDIX

J. ARTHUR SMITH, III
524 France Street
Baton Rouge, LA 70802
(504) 383-7716

Counsel to Petitioners

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SUPREME COURT OF LOUISIANA

New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE #32

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 20th day of March, 1986, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

85-C-1541	Lawrence Bell, et al v. Department of Health and Human Resources, East Louisiana State Hospital and Department of State Civil Service
	CALOGERO & DENNIS, J.J., would grant a rehearing.

SUPREME COURT OF LOUISIANA

NO. 85-C-1541

LAWRENCE BELL, WILBERT BELL,
KERNAN PERKINS and GEORGE HARDY

versus

DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, EAST LOUISIANA STATE
HOSPITAL and DEPARTMENT OF STATE
CIVIL SERVICE

Writ of Review to the Louisiana
State Civil Service Commission
Parish of East Baton Rouge,
State of Louisiana

BLANCHE, Justice

On December 23, 1982, plaintiffs were informed by letter from the Director of the Department of Civil Service that they were reallocated from their former position of Equipment Operator I to the position of

Labor-Utility. Exercising their right for a review of the reallocation, plaintiffs appealed the reallocation decision to the Director. The Director undertook a "desk audit" and based on the report affirmed the reallocation. Plain tiffs objected to the affirmation on the ground that the decision was based on documents not furnished to them. The Director rescinded his decision and ordered a new "desk audit". A second report was prepared by personnel not involved in the original "desk audit". Based on the second report, the Director reaffirmed the reallocation. Copies of the

audit reports were sent to plaintiffs' counsel.

Plaintiffs appealed the Director's decision to the Civil Service Commission. In their appeal, plaintiffs allege that the reallocation was improper (1) because it resulted in their being demoted without cause, (2) because the reallocation was the result of discrimination, (3) since their duties had not changed, the reallocation violated Civil Service Rule 1.32 (hereinafter cited as "CSR"), and (4) because the procedures utilized to effectuate these reallocations violated procedural due process requiremen ts. The Commission granted the

request of the Department of Civil Service for summary dismissal of the first two of plaintiffs' three claims, but ordered the appeal referred to the merits to consider whether there had been a Rules violation.[1]

On appeal, the Court of Appeal affirmed the decision of the Commission dismissing the first two of plaintiffs' three

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1. The Civil Service Commission did not address plaintiffs' constitutional challenges, nor did it have the authority to do so. See Appeal of Brisset, 436 So.2d 654 (La. App. 1st Cir.), writ denied 441 So.2d 749 (La. 1983).

claims[2], finding that the plaintiffs are not entitled to a pre-reallocation notice in writing of the grounds for the action, nor are they entitled to a pre-reallocation hearing. The court's decision was based on the fact that the present version of our constitution only provides these safeguards in "disciplinary actions." Compare, La. Const. art. XIV,

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2. Since the Commission treated defendants' Motion for Summary Disposition as an exception of no cause of action, all well pleaded allegations in the appeal letter are to be taken as true for the purposes of deciding whether they set forth a right of appeal. See Didier v. Department of Civil Service, 446 So.2d 886 (La. App. 1st Cir. 1984).

§15(N)(1) (1921 version). Further, the court found that the reallocation procedures did not violate plaintiffs procedural due process rights. Finally, the court found that the plaintiffs did not allege facts in support of their claim of discrimination with sufficient detail so as to entitle them to a Commission review on this issue. Bell v. Department of Health and Human Resources, 472 So.2d 235 (La. App. 1st Cir. 1985).

We granted writs on application of the plaintiffs to determine (1) whether the reallocation procedures adopted by the Commission satisfy

constitutional mandates, and (2) whether the plaintiffs have stated a ground for appeal under the Civil Service Rules. Specifically, we are called to decide whether Article X, §8(A)[3]

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3. Article X, §8(A) provides:

> No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. A classified employee shall have a right to appeal...

La. Const. art. X, §8(A) (Supp. 1985). In addition to the notice provided in this article, in certain situations, due process requires that there also be a pre-deprivation hearing. Cleveland Bd. of Educ. v. Loudermill, ____ U.S. ___, 105 S.Ct. 1487, ___ L. Ed.2d ___ (1985), and authorites cited therein.

and/or Article I, §2[4] require pre-deprivation notice and a hearing, as is provided for in disciplinary actions, in a reallocation situation. Further, we are called to decide, assuming that the present reallocation procedures pass constitutional muster, whether the plaintiffs have alleged facts in support of their claim of discrimination with sufficient detail to state a basis for an appeal to the

---

4. Article I, §2 provides:

> No person shall be deprived of life, liberty, or property, except by due process of law.

La. Const. art. I, §2 (1977).

Commission. 477 So.2d 91 (La. 1985).

Constitutional Mandates Relative to Reallocation Procedures

The resolution of the issues presented involves two separate and distinct constitutional questions. First, we must determine if Article X, §8(A) applies to reallocation decisions, and thus accords the procedural rights plaintiffs seek. If not, then we must determine if the reallocation procedures adopted by the Commission satisfy Article I, §2 and its notions of procedural due process.

In arguing that plaintiffs are entitled to the protections

of Article X, §8(A), counsel for the plaintiffs relies on the case of Perkins v. Director of Personnel, 220 So.2d 253 (La. App. 1st Cir. 1969), and various sections of the Civil Service Rules. In Perkins, supra, the court held that a civil service employee whose position was reallocated to a lower class was demoted within the meaning of the then constitutional provision requiring the appointing authority to give the employee pre-reallocation notice in writing and an opportunity to be heard. In reaching its conclusion, the court, relying on CSR 1.11, 1.25 and 1.32, equated the terms "demotion" and

"reallocation", and found that these procedural safeguards were required by Article XIV, §15(N)(1) which provided:

> No person in the State or Classified Service, having acquired permanent Civil Service status, shall be demoted. . ., except for cause, expressing in writing . . . .

La. Const. art. XIV, §15(N)(1) (1921 version, superceded by La. Const. art. X, §8(A) (1977))(emphasis added). This reliance is misplaced.

Article XIV, §15(N)(1) was not carried over in the 1974 Constitution. The substance of that article is now contained in Article X,§8(A). In essence, civil service employees are now

only granted the right to pre-deprivation notice in writing and a hearing in disciplinary actions.[5] Our question becomes whether a reallocation is a disciplinary action within the

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5. From a review of both the prior version of our constitution (Article XIV, §15) and the present version (Article X, §8) it is clear that the legislature in drafting the amendment attempted to eliminate excessive verbiage. See Thorenson v. State Dept. of Civil Service, 433 So.2d 184 (La. App. 1st Cir.), writ denied 440 So.2d 726 (La. 1983). The language of the prior constitution, "demoted, dismissed, or discriminated against," is merely a partial recitation of disciplinary actions. See CSR 12.1 et seq. The legislature in an attempt to provide a more encompassing list of actions entitled to the procedural protections of notice and hearing, and to do so with verbal economy, merely used the term "disciplinary actions."

meaning of our present constitution. For the following reasons, we conclude that it is not.

Having reviewed the entire scheme of the Civil Service Rules, demotions and reallocations are mutually exclusive actions. Demotion is defined as "a change of a permanent or probationary employee from a position of one class to a position of another class for which a lower minimum rate of pay is prescribed." CSR 1.11. Reallocation is defined as "a change in the allocation of a position from one class to another class wherein the duties of the position have undergone a

change." CSR 1.32. Plaintiffs argue that a reallocation by definition is a demotion, and that as a demotion, it encompasses the procedures outlined in CSR 12.1 et seq., the provisions dealing with disciplinary actions. Since Chapter 12 of the Rules provides the same procedural protections as Article X,§8(A), by implication plaintiffs argue that this article is also applicable. This argument is without merit.

It is without question that by virtue of the reallocation of plaintiffs were "demoted" within the meaning of the term as defined in CSR 1.11.

Additionally, it is without question that a demotion is a disciplinary action, see CSR 12.1 et seq., and therefore entitled to the procedural protections of both the Civil Service Rules and Article X, §8(A). However, plaintiffs' reasoning falters when they argue that a reallocation, merely because of semantics, is entitled to the same procedural protections under Article X, §8(A) as are other disciplinary actions. We conclude that it is the substantive nature of the action, rather than its definition, which is controlling.

Reallocation is not a disciplinary sanction. The Director's recommendation of a reallocation is in no way dependent on the job performance of the employee. The Director is merely fulfilling his duty to provide a system of uniform pay based on classification of job activities. CSR 3.1(p). His decision to reallocate an employee is based on an analysis of the duties performed (as distinguished from the competency of the performance). Upon determining what duties an employee actually performs, the Director then merely looks to the job description of respective classes to determine

into which class the employee is to be situated.

Perkins, supra, was correct, and our present constitution does not change the holding, that in situations where an employee is demoted (a disciplinary action under CSR 12.1 et seq.), Article X, §8(A), as well as the Civil Service Rules, require that there be pre-discipline notice in writing setting forth the cause for the action, and a hearing. Perkins, supra, was incorrect in concluding that a reallocation is a demotion, therefore giving rise to the same procedural protections. To this extent, Perkins, supra, is overruled.

Because Article X, §8(A) by its very terms does not provide plaintiffs the procedural protections they seek we must determine whether Article I, §2, and its embodyment of traditional notions of procedural due process, requires in a reallocation situation both pre-reallocation notice in writing setting forth the grounds for the decision and an opportunity to be heard. We first turn to a description of the procedures relative to a reallocation of an employee, and thereafter consider the factors bearing on the constitutional adequacy of these procedures.

Under the present version of the Rules, the provisions relative to reallocation provide for the following procedures. It is the duty of the Director to develop and propose to the Commission uniform classification and pay plans and amendments thereto, CSR 3.1(p). In fulfillment of his duty, the Director shall cause to be prepared a classification plan, which plan shall consist of job specifications, designated by standard titles, designed to provide for all positions in the classified service. CSR 5.1(a). After the adoption of the plan, the Director shall allocate each position in the classified

service to its appropriate class, and may reallocate positions from class to class. CSR 5.1(a).

There is no provision for a pre-reallocation notice in writing of the cause of the reallocation to be sent to the affected employee, nor is there a provision for a prereallocation hearing. Upon notice of the reallocation decision of the Director, an employee affected by the reallocation shall be afforded a reasonable opportunity to have his case reviewed by the Director, and the Director's decision shall be final unless the employee is accorded a right to appeal to

the Commission. CSR 5.1(a) (emphasis added). An employee is basically granted a right of appeal to the Commission of the Director's review of the reallocation if:

> (a) the employee has failed to obtain the requested relief from the reallocation after the request for review provided in CSR 5.3(a), and there are allegations that the Director's decision has been discriminatory; or
>
> (b) the employee alleges that he has been deprived of any right by the violation of a Civil Service Rule; or
>
> (c) as otherwise provided. (Other situations which allow a right to appeal are not at issue in this case.)

CSR 13.10 (emphasis added).

In the present case, plaintiffs appealed the reallocation to the Director pursuant to CSR 5.3. After two desk audits, the Director affirmed the reallocation. Plaintiffs appealed the decision to the Commission under CSR 13.10, alleging that the Director's decision was the result of discrimination, and that the Director had violated CSR 1.32. The second issue is still on appeal before the Commission. The merits of the discrimination allegation will be discussed later in this opinion.

At this point we will address plaintiffs' contention that the due process clause of the Louisiana Constitution, Article I, §2, requires that they receive pre-reallocation notice in writing setting forth the grounds for the action and an opportunity to be heard. For the following reasons, we disagree and hold that in a reallocation determination an employee is not entitled to either a pre-reallocation notice or an opportunity to be heard. In this respect, the Rule adopted by the Commission relative to reallocations do not violate Article I, §2, and its

notions of procedural due process.

The provisions of the state constitution involving the Civil Service, Article X, §1 et seq., and the Rules of the Commission are designed to secure adequate protection to the public career employee from political discrimination. They embrace the merit system, and their intent is to preclude favoritism. The purpose of the Civil Service Rules is to guarantee the security and welfare of the public service. Sanders v. Department of Health & Human Resources, 388 So.2d 768 (La. 1980) (emphasis added). With this in mind, it is clear

that tenure or classified civil service status is a property right within the meaning of Article I, §2 of our constitution, a prerequisite to a due process challenge. Delta Bank & Trust Co. v. Lassiter, 383 So.2d 330 (La. 1980). Under our constitution and the Civil Service Rules, an employee who has gained classified permanent civil service status has an entitlement to his position, since he has already received the position, and applicable law guarantees him continued employment, save for some exceptions (i.e. disciplinary sanctions for cause). Cleveland Bd. of Educ. v. Loudermill,

supra; Arnette v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33L.Ed.2d 570 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Having concluded that a classified permanent employee enjoys a property right in maintaining his status, it is axiomatic that his position may not be changed or abolished without due process of law. Cleveland Bd. of Educ., supra. The question becomes what process is due.

The decisions of the United States Supreme Court, as well as

the jurisprudence of this state, underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Mathews v. Eldrige, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). It is a flexible standard and calls for such procedural protections as the particular situation demands. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). It is particularly flexible in the area of administrative law. See Smith v. Division of Admin., 415 So.2d 381 (La. App. 1st Cir. 1982); Hamilton v. La. Health &

Human Resources Admin., 341 So.2d 1190 (La. App. 1st Cir. 1976), writ refused 344 So.2d 4 (La. 1977). Where the power of the government or an agency is to be used against an individual thee is a right to a fair procedure to determine the basis for, and the legality of, such action. Nowak, J., et al., Handbook on Constitutional Law, Ch.15, p. 477 (1978).

Our determination of the scope of procedural due process protections in a reallocation situation requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action;

> second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

Mathews, ___ U.S. at ___, 96 S.Ct. at 903, ___ L.Ed.2d at ___ (cited with approval in Cleveland Bd. of Educ., ___ U.S. at ___, 105 S.Ct. at 1491, fn.2).

First, the significance of the private interest in retaining a previous level of earning capacity cannot be gainsaid. Such interests are

the same in both a reallocation situation and a disciplinary action. In both, an employee will be deprived of a certain amount of their pay. Courts have frequently recognized the severity of depriving a person of income. Cf. Cleveland Bd. of Educ., supra, and authorities cited therein.

However the similarity between reallocations and disciplinary actions ends when one considers the mechanics of both as they relate to the change for an erroneous decision. Unlike disciplinary actions, a reallocation is not the result of an evaluation of the job performance of an

employee. It does not center on any facts surrounding the employee whatsoever. A reallocation is the result of an internal decision made by the Director after reviewing the job duties of an employee and comparing them with previously outlined job classifications. In this regard, there is little chance for an erroneous decision. Procedural due process concerns are lessened in a reallocation situation as opposed to a disciplinary action. Our constitution in Article X, §8(A) recognized this distinction, and we believe that the distinction is also valid under Article I, §2.

In disciplinary actions, due process concerns are heightened since the focus in such actions is in the individual employee. Evidence is taken, and the Director then enters a decision based on his findings. Meaningful procedural due process notions are furthered by allowing pre-deprivation (disciplinary action) notice in writing setting forth the causes for the action, and an opportunity to be heard. By providing an employee with these minimal procedural protections, an employee can prepare a defense, call witnesses on his own behalf, testify himself, and cross

examine opposing witnesses. These protection diminish the possibility of an erroneous deprivation prior to its occurrence. Such concerns are not meaningful in a reallocation.

As alluded to, in a reallocation, there is no evidence taken. There are no witnesses, and the employee need not prepare a defense. the Director determines if reallocation is warranted based on the job duties of the employee and the job specifications stated in the classification system. At this point in the procedure, no meaningful application of the

due process notions of notice and opportunity to be heard would be gained. See Cleveland Board of Education, supra. It is when the focus of the reallocation changes to considerations of the employee (i.e. allegations of discrimination), or when there are allegations of a Rules violation, that notice and an opportunity to be heard crystalize into something meaningful. Article I, §2 would require that at this point there be these minimal procedural protections.

The Civil Service Rules satisfy Article I, §2 in that they do provide for a review of

the Director's actions by a neutral decisionmaker upon allegations of discrimination and/or a Rules violation. It is at this point that the neutral decisionmaker can assure that an employee's substantive due process rights have not been deprived without just cause.[6] Any benefit from a substitute

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6. In 1972 the old constitution was amended to specifically eliminate the right to an evidentiary hearing. Compare La. Const. of 1921, art. XIV, §15(I)(b) with 1972 La. Acts, No. 788 (adopted as a constitutional amendment, November 7, 1972). The new constitution makes no provision for a hearing. Although it appears that the employee does not have an absolute right to an evidentiary hearing, we need not decide whether due process concerns require an evidentiary hearing.

procedure, requiring both pre-reallocation notice and an opportunity to be heard, would be outweighed by the burdens it would place on the system. Were an employee entitled to notice and a hearing in every reallocation, the maintenance of a uniform pay system would be jeopardized. Plaintiffs are sufficiently protected under the present scheme.

In closing, we note that there seems to be an emerging concept that in some instances due process is fulfilled by a "post deprivation" hearing. Cleveland Bd. of Educ., ___ U.S. at ___, 105 S.Ct. at 1493, ___ L. Ed. 2d at ___ (citing with

approval Ewing v. Myntinger & Casselberry, 339 U.S. 594, 70 S.Ct. 870, 94 L. Ed. 1088 (1950); North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L. Ed. 195 (1908)). We believe that this view to procedural due process in certain situations is sound and is in support of our decision here. Prior to allegations of some improper actions on the part of the Director, there is not need for review. Upon allegations supporting a right of appeal, a right of review is accorded to a neutral decisionmaker. During the pendency of these actions, and for a period of two years, a

downwardly reallocated employee's pay is frozen. While he no longer earns merit raises in the former pay range, he does earn the increases at his new (lower) pay range. CSR 6.28(b). It can be said that during these proceedings an employee has not been deprived of a significant property right, a prerequisite to any heightened due process inquiry. The high Court in Cleveland Bd. of Educ., supra, dealt with a termination situation where the affected employee would lose his pay immediately. The high Court relied strongly on this fact in support of its decision requiring pre-deprivation notice

and a hearing. For the reasons stated herein, the same considerations are not present in a reallocation.

Discrimination

Plaintiffs have alleged discrimination by both their supervisor and the Director. They allege that their supervisor had personal animosity toward them, but they also state that their duties have remained unchanged. As the Court of Appeal notes: "Consequently their supervisor's personal animosity could have no bearing on the reallocation." Bell, 472 So.2d at 238. From a review of the record we find that there was no manifest

error. Although there could be situations where the supervisor might be able to discriminate against an employee he dislikes by reducing the employee's duties to the point that a reallocation would eventually follow, see Appeal of Gladys Rich, Docket Nos. 2010, 2520 and 2614 (La. Civil Service Commission, June 3, 1983), such is not the position of the plaintiffs. "Moreover, the question whether their duties have changed so as to merit the reallocation is yet to be resolved in their appeal still pending before the Commission." Id.

It is plaintiffs' contention that the reallocation was the result of discrimination on the part of the Director which is more troublesome. It is only if the plaintiffs have alleged with sufficient specificity facts which support the conclusion of discrimination on the part of the Director that they have perfected an appeal as

to the issue. CSR 13.11(d).[7] The Court of Appeal affirmed the decision of the Commission which concluded that plaintiffs have failed to perfect an appeal based on allegations of discrimination by either the supervisor or the Director. From a review of the record, we find no error. Plaintiffs have not alleged specific facts in

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7. CSR 13.11(d) provides:

Where discrimination is alleged to be a basis for appeal, specific facts supporting the conclusion of discrimination must be alleged in detail. The specific facts required will vary depending on the nature of the appeal; however, the facts must be alleged in sufficient detail to enable the agency to prepare a defense. A conclusion of discrimination is <u>not</u> sufficient.

sufficient detail to support their claims of discrimination. In essence, their allegations are mere conclusions which state that the Director applied a disparate standard in deciding their CSR 5.3 review request. Plaintiffs did not allege any action of the Director which constitutes discrimination. Therefore, plaintiffs have not complied with CSR 13.11(d) and their appeal on the issue of discrimination has not been perfected.

DECREE

For the above stated reasons, the judgment of the

Court of Appeal for the First Circuit is affirmed.

AFFIRMED.

SUPREME COURT OF LOUISIANA

No. 85-C-1541

LAWRENCE BELL, WILBERT BELL, KERNAN PERKINS, AND GEORGE HARDY

VERSUS

DEPARTMENT OF HEALTH AND HUMAN SERVICES, EAST LOUISIANA STATE HOSPITAL AND DEPARTMENT OF STATE CIVIL SERVICE

DENNIS, Justice (dissenting)

I respectfully dissent. The majority opinion approves a system with no notice to the employee prior to "reallocation" to a lower-paying position, and with no provision for a hearing before this reallocation, either formal or informal. The employee has the right to appeal the Director's decision to the

Commission only in limited circumstances.

But as we noted in Wilson v. City of New Orleans, 479 So.2d 891 (La. 1985), due process is not an all-or-nothing proposition which requires either a full trial-type adversary hearing or no process at all.

> "In some circumstances due process does not require trial procedure but forbids resolving a question of adjudicative fact against a party without first allowing him to respond informally to a summary of adverse evidence." [2 Davis, Administrative Law, at 474 (1979)] .... The cardinal proposition of [Goss v. Lopez, 419 U.S. 565 (1975)] is that on a question of adjudicative fact for which a trial is not appropriate, due process may require notice and an opportunity for informal response; that the

> important idea of Eldridge is that a main reason for denying a trial-type hearing may be that the informal procedure the agency has provided is adequate, Id. at 474 . . . . Wilson, supra, at 897.

Relators in this case alleged that the Director denied their request to be allowed to respond in writing to the findings of the reclassification analysis, and that he refused to even let them respond orally before him. Such an informal procedure is the minimum due process requires when the government proposes to deprive persons of as important a property right as one-third of their salary.

The majority opinion also concludes that relators did not

allege specific facts in sufficient detail to support a claim of discrimination. They alleged personal animosity on the part of their supervisor, Luther Cutrer; that the only employees whose positions were reallocated were those who worked for Mr. Cutrer; that Mr. Cutrer opposed step increases they received, and continued to be angry after they received these increases; that the adverse action against them was taken as a result of Mr. Cutrer's animosity; and that shortly after the reallocations were announced, Mr. Cutrer tried to get relators to resign to circumvent their right to

appeal. These allegations support a claim of discrimination with sufficient specificity to entitle relators to a hearing on the claim. Under Civil Service Rule 1.14.1, discrimination includes consideration of non-merit factors. Personal animosity of an immediate supervisor is clearly a non-merit factor.

For the foregoing reasons, I respectfully dissent.

CALOGERO, Justice dissenting.

I respectfully dissent.

The majority opinion concludes that "[r]eallocation is not a disciplinary sanction," and therefore is not subject to the provisions of La. Const. art. X, §8(A). That constitutional article provides in pertinent part:

> No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing.

This provision requires that a cause be stated in writing prior to action in a disciplinary matter. Such a requirement does not appear to be an undue burden

on administrators charged with making such decisions in view of a permanent civil service employee's property right in maintaining his status. Cleveland Bd. of Educ. v. Loudermill, ___U.S. ___, 105 S.Ct. 1487, 1491 (1985). However, if disciplinary action is not involved, as was found by the majority with regard to reallocation, then this standard of due process is not required.

To reach their conclusion it was necessary for the majority to determine that reallocation and demotion, the latter clearly a disciplinary matter, were "mutually exclusive actions". I do not agree.

Although a reallocation need not always constitute a demotion, there surely are instances in which it may be.

I believe that reallocation and demotion are not mutually exclusive actions and that the procedural guarantees of La. Const. art. X, §8(A) are applicable to both.

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821

DATE: JUN 26, 1985 DOCKET

NUMBER: CA/84/0576

LAWRENCE BELL, WILBERT BELL,
KERNAN PERKINS & GEORGE HARDY

VERSUS

DEPARTMENT OF HEALTH AND HUMAN
RESOURCES, E. LA. STATE HOSPITAL
& DEPT. OF STATE CIVIL SERVICE

NOTICE OF JUDGMENT

TO:

J. Arthur Smith, III, Atty.
524 France Street
Baton Rouge, LA 70802

Robert R. Boland, Jr., Atty.
P.O. Box 44211
Baton Rouge, LA 70804

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeal, effective July 1, 1982.

CLERK OF COURT

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

STANLEY P. LEMOINE, CLERK

COURT OF APPEAL,
FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE August 30, 1983.

LAWRENCE BELL, STATE OF LA
WILBERT BELL,
KERNAN PERKINS and
GEORGE HARDY COURT OF APPEAL

FIRST CIRCUIT

VERSUS

NO. 84-CA-0576

DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, EAST
LOUISIANA STATE HOSPITAL
and DEPARTMENT OF STATE
CIVIL SERVICE

ON APPEAL FROM THE STATE
CIVIL SERVICE COMMISSION,
HONORABLE JAMES R. SMITH,
CHAIRMAN.

BEFORE: EDWARDS, SHORTESS and
SAVOIE, JJ.

EDWARDS, JUDGE.

Four civil servants appeal the Commission's partial dismissal of their appeal of the Director's reallocation of their job to positions of lower pay. We affirm.

Plaintiffs were informed by letter from the Director of the Department of Civil Service on December 23, 1982, that their positions had been reallocated from Equipment Operator I to Laborer-Utility. Plaintiffs appealed this reallocation to the Director pursuant to Civil Service Rule 5.3 and to the Civil Service Commission pursuant to Rule 13.10. The Director affirmed the reallocation, but after plaintiffs' objection that his decision was based on documents not furnished to them, he rescinded that decision and ordered a new desk audit by personnel who had not been

involved in the audit which culminated in the original reallocation. Nonetheless after the second audit, the Director advised the plaintiffs and their counsel that, based on this new evaluation, he was reallocating the positions to the class of Labor-Utility. This time, however, the Director sent copies of the audit reports along with his letter to counsel for plaintiffs.

In their appeal to the Civil Service Commission plaintiffs alleged that the reallocation was improper because (1) it resulted in their being demoted without cause, (2) the reallocation was the result

of discrimination, and (3) since their duties had not changed, the reallocation violated Civil Service Rule 1.32. The Commission granted the request of the Department of Civil Service for summary dismissal as to the first two of plaintiffs' three claims, but ordered the appeal referred to the merits to consider whether plaintiffs' duties had changed.[1]

DEMOTION

There is not question that if a position is reallocated downward, the incumbent is by definition demoted. Civil Service rule 1.11 defines a demotion as "a change of a permanent or a probationary

employee from a position of one class to a position of another class for which a lower minimum rate of pay is prescribed." Yet this does not end the inquiry.

The new constitution did not carry over the 1921 constitution's prohibition of demotion without cause expressed in writing. See La. Const. of 1921, art. XIV, § 15 (I)(b). Consequently plaintiffs' reliance on Perkins v. Director of Personnel, 220 So.2d 253 (la. App. 1st Cir. 1969), decided under the constitution that a reallocation downward was a demotion without cause, and therefore was unconstitutional. 220 So.2d at 256.

The new constitution does, however, prohibit disciplinary action without cause expressed in writing. La. Const. art. X, §8(A). Yet plaintiffs' demotions did not result from disciplinary actions. In fact a reallocation cannot be a disciplinary action, since it is based on the duties required of a worker rather than on his level of performance of those duties. Moreover, the actions are taken by different people: The appointing authority takes disciplinary action, see Civil Service Rule 12.1, while the Director reallocates,[2] see Civil Service Rule 5.2(a). Accordingly the reallocation did

not violate the Civil Service provisions of the present constitution.

DISCRIMINATION

Plaintiffs have alleged discrimination by both their supervisors and the Director. Plaintiffs alleged that their supervisor had personal animosity toward them, but they also said that their duties have remained unchanged. Consequently their supervisor's personal animosity could have no bearing on the reallocation. The Director makes reallocations strictly on the basis of comparing the assigned duties of an employee to a uniform pay plan, to accomplish the

objective of equal pay for equal work.

Although we are mindful of the fact that a supervisor might be able to discriminate against an employee he disliked by reducing the employee's duties to the point that his job would eventually be reallocated downward, see, e.g., Appeal of Gladys Rich, Docket Nos. 2010, 2520, and 2614 (La. Civil Service Commission, June 3, 1983), this is not what plaintiffs have alleged.[3] Moreover, the question whether their duties have changed so as to merit the reallocation is yet to be resolved in their appeal

still pending before the Commission.

Any employee affected by a reallocation may have his case reviewed by the Director, and the Director's decision is final "unless there is an allegation that his ruling has been discriminatory." Civil Service Rule 5.3(a). Upon an allegation that the Director's decision has been discriminatory, a person may appeal to the Commission. Civil Service Rule 13.10(d).

> Where discrimination is alleged to be a basis for appeal, specific facts supporting the conclusion of discrimination must be alleged in detail. The specific facts required will vary depending on the nature of the appeal; however, the facts must be alleged in sufficient detail to enable the agency

> to prepare a defense. A conclusion of discrimination is not sufficient.

Civil Service Rule 13.11(d).

Plaintiffs' allegations that the Director's ruling was discriminatory consisted merely of statements that he applied a disparate standard in deciding their appeal. Plaintiffs did not allege with particularity any action by the Director which constituted discrimination. The Commission was correct in concluding that plaintiffs failed to perfect an appeal based on discrimination by either their supervisor or the Director.

DUE PROCESS

Finally, plaintiffs allege that the method by which reallocations are reviewed violates due process. The reallocation review process is established by Civil Service Rule 5.3(a) and 13.10(d), and these rules have the effect of law. See La. Const. art. X, §10(A)(4). So long as these rules constitute a reasonable exercise of the Commission's rule-making power and do not violate basic constitutional rights, they must be enforced. Shelton v. Southeastern Louisiana University, 431 So.2d 437, 439 (La. App. 1st Cir. 1983).

Although plaintiffs are unquestionably entitled to due process, what constitutes due process varies depending upon the interests involved. Due process is particularly flexible in the area of administrative law; it does not always neccessitate a full trial. Smith v. Division of Administration, 415 So.2d 381, 385 (La. App. 1st Cir. 1982). No one has a vested right to any particular procedure. Hamilton v. Louisiana Health & Human Resources Administration, 341 So.2d 1190, 1193 (La. App. 1st Cir.), cert. denied, 344 So.2d 4 (La. 1977).

The governmental interest involved here is the maintenance of a uniform pay plan. The private interests are the employees' pay and their potential earning ability. The Civil Service Rules are the result of an attempt at a reasonable compromise whereby the Commission is able to fulfill its constitutionally mandated responsibility to maintain a uniform pay plan and yet afford employees some protection.[4]

An employee has a right to challenge a downward reallocation, first by requesting that the Director review the reallocation, and

then by appealing to the Civil Service Commission. Civil Service Rules 5.3(a) and 13.10(d). Nevertheless, the employee does not have an absolute right to an evidentiary hearing before the Commission on his appeal of a reallocation.[5]

An evidentiary hearing would serve no useful purpose; the relevant facts are undisputed. In the reallocation process, the only relevant facts are the employee's duties and responsibilities and the contents of the class specifications. Because of the way the reallocation process works, by the time an employee asks for a review of his

reallocation he has already submitted and his supervisor has verified a description of his duties, and a desk audit of the employee's job has been conducted. Thus the employee's duties and responsibilities are in writing and undisputed. The class specifications, which have already been developed by the Director and approved by the Commission, are also in writing. See Civil Service Rule 5.1. The employee's reasons for contesting the reallocation are contained in his written request for review. Consequently all that remains is for the Director to decide which class

specification encompasses the duties listed.

The Director's decision is then final unless the employee appeals to the Commission, alleging that the Director's decision was discriminatory and specifically pleading facts supporting discrimination. If the employee does so, he is provided an evidentiary hearing before the Commission. Thus the employee affected by the downward reallocation is given notice and an opportunity to have his reallocation reviewed by the Director, and under certain circumstances, a right to an evidentiary hearing before the Commission. Considering

both the private and governmental interests involved, this procedure conducted in accordance with Civil Service Rules 5.3(a) and 13.10(d) fulfills the requirements of due process.

For the foregoing reasons the decision of the Commission is affirmed.

AFFIRMED.

FOOTNOTES

[1]Plaintiffs' appeal on this issue, therefore is still pending before the Commission.

[2]Under the old constitution, the State Civil Service Commission had to adopt a classification plan, which required the classifications of position "according to similarity of duties performed and responsibilities assumed, so that the same qualification . . . and the same . . . pay . . . applied to all positions in the same class." It was the Director's job to allocate the positions of the employees to positions in the pay plan, and to make allocations or reallocations of positions necessitated by the creation of new classes, or the division, alteration, or abolition of existing classes. Employees affected by such changes had the right to appeal to the Director and later to the Commission. La. Const. of 1921, art. XIV, §15(I)(b).

In 1972 the constitution was amended to eliminate the language from section 15(I)(b), and the Commission was simply granted the power "to adopt, amend, repeal and enforce rules

which have the effect of law, regulating . . . personnel transactions."

Then in the 1974 constitution, no provision for reallocation was made. The Commissioner was simply granted "broad and general rule-making . . . powers for the administration and regulation of the classified service," and the Commission was given the responsibility of adopting a uniform classification and pay plan. La. Const. art. X, §10 (A)(1).

[3]See the opinion of the Civil Service Commission for a more detailed discussion.

[4]When an employee's position is reallocated downward, his pay is protected for two years. His pay is frozen, and he no longer earns merit increases in the former pay range, but rather earns merit increases in the new (lower) pay range. Civil Service Rule 6.28(b).

[5]In 1972 the old constitution was amended to specifically eliminate the right to an evidentiary hearing. Compare La. Const. of 1921, art. XIV §15(b) with 1972 La. Acts 778 (adopted as a constitutional

amendment, Nov. 7, 1972). The new constitution makes no provision for a hearing.

LAWRENCE BELL, ET AL
VERSUS
DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL

NUMBER 84CA0576

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LA

SHORTESS, J., DISSENTING

The majority has affirmed a Civil Service decision which summarily demotes these appellants notwithstanding allegations of improper demotion, discrimination and deprivation of due process.

I do not know what the facts are because no hearing was ever held, but the appellants allege that they were serving as permanent civil service employees with Equipment

Operator I classifications and that they were reallocated to positions of "Laborer-Utility". They allege that this reallocation results in pay reductions that will approximate one-third of their salaries.

In my opinion, appellants are entitled to a hearing on these allegations of demotion without cause, as per Civil Service Rule 13(b). The Commission erred and the majority compounded the error in holding that the 1974 Constitution changed the law as expressed in Perkins v. Director of Personnel, 220 So.2d 253 (La. App. 1st Cir. 1969), that a reallocation downward was a

demotion which triggered the right to notice and hearing.

The majority finds that the "Commission was correct in concluding that plaintiffs failed to perfect an appeal based on discrimination by either their supervisor or the Director." Yet the Commission found that appellants had adequately alleged discrimination by their supervisor but found that to be irrelevant since they alleged no discrimination by their director. This ruling was made on the premise that the supervisor demotes and the director reallocates. I cannot so easily take comfort in these

semantic exercises when the bottom line is that appellants will lose one-third of their pay from this alleged discrimatory reallocation (demotion), yet still have the same work duties. This action results in the loss of very important property rights. It should have triggered the due process right to have an appeal decided only after adequate notice and hearing. I would reverse and remand for a complete hearing.

I respectfully dissent.

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OPINION OF THE STATE CIVIL SERVICE COMMISSION DATED

FEBRUARY 13, 1984

LAWRENCE BELL, WILBERT BELL, KERNAN PERKINS AND GEORGE HARDY, DOCKET NO. 3643

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. . . . . .OPINION. . . . . .

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. . DATED: February 13, 1984. .

. . FILED: February 13, 1984. .

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IN RE:
Appeal of Lawrence Bell, Wilbert Bell, Kernan Perkins & George Hardy

STATE OF LA
CIVIL SERVICE COMM
DOCKET NO. 3643

(DHHR, East La. State
Hospital and Department
of State Civil Service)

: : : : : : : : : : : : : : : : :

STATEMENT OF THE APPEAL

Appellants are employed by the Department of Health and Human Resources at East Louisiana State Hospital and are serving with permanent status. Effective October 11, 1982, appellants' positions were reallocated downward from Equipment Operator I to Laborer/Utility.

On January 12, 1983, counsel for appellants filed a request for appeal wherein appellants complain of their reallocations and allege that on December 23, 1982, they learned

that their positions had been reallocated. Appellants allege that their reallocations will result in a substantial reduction in pay in November 1984 and that their present salaries will be frozen until November 1984. As the bases for appeal, appellants allege that they have been discrimi-nated against for a non-merit reason, specifically, personal animosity on the part of their supervisor, Luther Cutrer. Additionally, appellants content that the reallocations were improper and unlawful because their positions had previously been allocated to the class of Equipment Operator I and there has been no

change in appellants' duties and responsibilities since the positions were originally allocated. Appellants assert that the reallocations circumvented Civil Service Rule 12.1 which requires that demotions be for cause. In support of the allegations of discrimination, appellants allege that they have been diligent employees for many years and have given their employer no justification for demoting them; that their job performance has been as good as or better than other employees whose positions were not reallocated; that their duties have increased rather than decreased; that the only

employees whose positions have been reallocated are those who work for Mr. Cutrer; that Mr. Cutrer opposed their step increases and continued to be angry after their step increases were granted; that the adverse action was taken as a result of Mr. Cutrer's animosity; and that shortly after the reallocations were announced, Mr. Cutrer tried to get appellants to resign to circumvent their right to appeal. As relief, appellants seek to be reinstated as Equipment Operators I, to be awarded any wages they might lose and to be awarded attorney's fees. This appeal

was docketed as No. 3643 against the Department of Health and Human Resources and the Department of State Civil Service.

By letter dated January 21, 1983, counsel for appellants stated that he wished the January 12, 1983 letter to be construed as a request for the Director to review appellants' allocations pursuant to Civil Service Rule 5.3 as well as an appeal to the State Civil Service Commission. By letter dated March 23, 1983, the Director of the Department of State Civil Service advised counsel for appellants that he had reviewed the position

descriptions and had studied the findings of the classification analysts who conducted the desk audits and that as a result of this review, he affirmed the decision of the Classification Division allocating appellants' positions to the class of Laborer/Utility. By letter dated April 8, 1983, counsel for appellants objected to the Director's having decided their appeal based on documents which were not furnished to appellants and argued that appellants were entitled to notice and a hearing prior to the rendition of the Director's decision. Counsel requested that the Director rescind his March 23, 1983

decision, that the documents referred to in the March 23, 1983 letter be furnished to appellants and that a hearing be scheduled. Alternatively, counsel asked that his letter be considered as an appeal to the Commission of the Director's decision of March 23, 1983. Counsel alleged that the Director's decision was discriminatory because he applied a disparate standard in deciding the appeal because he rejected, without a hearing, appellants' contention that their workload had not significantly decreased.

By letter dated April 21, 1983, the Director rescinded his

decision of March 23, 1983, and stated that a new desk audit of the positions would be conducted by a technician who had not previously been involved in the analysis of the positions and thereafter, the Director would again review the allocations. By letter dated June 9, 1983, the Director advised appellants and their counsel that based on his evaluation of the audit reports, he was reallocating appellants' positions to the class of Laborer/Utility. Copies of the audit reports referenced in this letter were sent to counsel for appellants.

On June 17, 1983, counsel for the Department of State

Civil Service filed a Request for Summary Disposition of the appeal wherein he argued that appellants have no right to appeal to the Commission because they have failed to plead discrimination with specificity. Counsel argues that appellants were not demoted, but rather were reallocated downward.

By letter dated June 20, 1983, counsel for the Department of Health and Human Resources argued that the actions complained against were those of the Department of State Civil Service rather than those of the Department of Health and Human Resources. Counsel advised that the Department of Health and

Human Resources had no objection to the success of the appeal and that no appearance would be made on behalf of the Department of Health and Human Resources.

On July 1, 1983, counsel for appellants filed another request for appeal wherein he challenges the Director's decision of June 9, 1983. As the bases for appeal, appellants incorporate by reference the allegations contained in their letters dated January 12, 1983, april 8, 1983 and May 2, 1983 as well as the allegations contained in an Opposition to the Request for Summary Disposition filed with the request for appeal. This appeal

was docketed as No. 3935, Pursuant to Civil Service Rule 13.23, the two appeals are hereby consolidated.

A public hearing, limited to a consideration of the issues raised in the Request for Summary Disposition and the Opposition thereto, was held before the Commission on July 7, 1983, in Baton Rouge, at which time counsel for appellants and for the Department of State Civil Service presented oral argument on the Request for Summary Disposition. The Department of Health and Human Resources made no appearance.

CONCLUSIONS OF LAW

The issue raised in the Request for Summary Disposition is whether appellants have a right to appeal to the Commission. Counsel for the Department of State Civil Service asserts that appellants' right to appeal is regulated by Civil Service Rules 5.3 and 13.10(d) and that appellants have failed to perfect this right because they have failed to properly plead discrimination. On the other hand, counsel for appellants asserts that appellants have been demoted without cause and that the reallocations violate Civil Service Rule 1.32 and therefore appellants have a right to

appeal under Civil Service Rule 13.10(b); and that the reallocations were discriminatory and therefore appellants have a right to appeal under Civil Service Rule 13.10(d). Counsel for both parties recognized that resolution of the issue presented herein depends upon an interpretation of the current applicability of the decision in Perkins v. Director of Personnel, 220 So.2d 253 (La. App. 1st Cir. 1969).

A. APPLICABILITY OF THE PERKINS DECISION

In Perkins, as a result of a desk audit, the appellant's job was reallocated downward. Appellant appealed to the

Director, who affirmed appellant's reallocation. Appellant then appealed the Director's decision to the Commission, which also affirmed appellant's reallocation. Appellant appealed the Commission's decision to the Court of Appeal. The Court held that a downward reallocation is a demotion and as such, because of the constitutional provisions then in effect, the employee was required to be furnished notice thereof by the appointing authority. Further, the Court expressed grave doubts concerning the constitutionality of a reallocation resulting in a demotion and

observed that under the constitutional provisions in effect at that time, a demotion could only be made for cause. The Court then recognized two types of cause: disciplinary and non-disciplinary. In the former type, the cause arises from substandard work or some other deficiency attributable to the employee. In the latter type, the cause arises from the necessity for the efficient and economical operation of an office and is not attributable to the employee. The Court in Perkins noted that appellant's reallocation fit into neither type of cause. The Court also noted that the constitutional

provisions in effect at that time specifically enumerated the circumstances under which a position could be reallocated, found that none of the enumerated circumstances was present in Perkins' case and held that the Director was powerless to reallocate Perkins' position. The Court characterized the Perkins case as one "of demotion without cause and reallocation without authority." Perkins, supra, at 256.

The Commission concludes that the Perkins decision is no longer applicable because the constitutional provisions upon which the Perkins decision was

based have been changed. When Perkins was decided, the constitutional provisions concerning reallocations read as follows:

The State Civil Service Commission shall adopt:

. . .

(b) A classification plan, prepared and submitted by the Director or already in existence, requiring the classification of positions in the classified service according to similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for, and the same schedule of pay may be equitably

applied to all positions in the same class. After such classification plan and any amendments of the plan from time to time have been adopted by the Commission, the Director, with the approval of the Commission, shall allocate the positions of every employee in the classified service to one of the positions in the pay plan. Thereafter, as new positions are created or additional classes are established, or existing classes are divided, combined, altered or abolished, the Director shall make such allocations or reallocations of positions to new or existing classes as are necessitated thereby . . .

Employees affected by the allocation or reallocation of a position to a class, or by any changes in the classification plan, shall be afforded a reasonable opportunity to be heard thereon, first by the Director and later by appeal to the Commission after filing with the Director a written request for a hearing.

[La. Const. 1921, Art. XIV, Sec. 15 (I)] As to demotions, the original Civil Service Amendment provided:

> "No person in the State or Classified Service, having acquired permanent status, shall be demoted, dismissed, or discriminated against, except for cause, expressed in writing by the appointing authority."

(Emphasis added). [La. Const. 1921, Art. XIV, §15(N)(1)] Thus, the original Civil Service Amendment specified the circumstances under which the Director could reallocate positions and also specified that all demotions had to be for cause.

In 1972, the constitution was amended and the language formerly contained in Article XIV, §15(I)(b) was eliminated. In lieu thereof, the Commission was simply granted the power "to adopt, amend, repeal and enforce rules which have the effect of law, regulating . . . personnel transactions." (La. Acts 1972, No. 778, adopted as a

constitutional amendment November 7, 1972.)

When the 1974 constitution was adopted, no provision for reallocation was made. In stead, the Commission was again granted "broad and general rule-making . . . powers for the adminis-tration and regulation of the classified service." Additionally, the Commission was charged with responsibility for adopting a uniform classification and pay plan. [La Const. Art. X, Sec 10(A)(1)] Further, the 1974 constitution does not require that all demotions be for cause expressed in writing. The current constitutional provision reads:

"No person who has gained permanent statues in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing." (Emphasis added.) [La. Const. 1974, Art. X, §8(A)] Thus, through amendments to the constitution, the Director's authority to reallocate positions is no longer limited to specified circumstances and there is no constitutional requirement that every demotion be for cause. For these reasons, the Commission concludes that the Perkins decision is no longer on point.

B. THE APPLICABLE CIVIL SERVICE RULES

The Commission has used its broad rule-making power to adopt rules governing allocation and reallocation of positions. Civil Service Rule 5.1(a) requires the Director to "cause to be prepared a classification plan and, from time to time, amendments thereto for presentation to the Commission for its approval following public hearing which plan shall consist of job specifications, designated by standard titles, designed to provide for all positions in the classified service." Civil Service Rule 5.2(a) provides: "The Director

> . . . shall allocate each position in the classified service to its appropriate class, and thereafter shall allocate each new position in such services [sic] to its appropriate class, and may reallocate positions from class to class." Civil Service Rule 5.2(b) provides: "In making such allocations, he shall provide for uniform application of the classfication plan to positions under different appointing authorities."

Thus, the Commission has, by rules which have the effect of law, assigned the function of allocating and reallocating positions to the Director. The

Director's authority to reallocate positions is not limited to particular circumstances; however, the Director's authority to allocate and reallocate positions is not without restriction. The Director's allocation and reallocation decisions must be in furtherance of the uniform application of the classification and pay plan and cannot be made on discriminatory bases.

The Commission recognizes that if a position is reallocated downward, and if that position is incumbered, by definition, the employee is demoted. Civil Service Rule

1.11 defines a demotion as: "a change of a permanent or a probationary employee from a position of one class to a position of another class for which a lower minimum rate of pay is prescribed." However, the Commission, through various rules, has recognized that not every demotion is a disciplinary action. Civil Service Rules 12.1 and 12.3 recognize that a demotion can be used as a disciplinary action. Civil Service Rule 8.21 recognizes that an employee may voluntarily request a demotion, in which case, none of the stigmas attached to disciplinary demotions ensue. Finally, Civil

Service Rule 5.28 recognizes that a demotion may result from a downward reallocation.

C.

REALLOCATION DOWNWARD AS A DISCIPLINARY ACTION

A reallocation downward is not a disciplinary action. The Commission is required to adopt and maintain a uniform classification and pay plan. [La. Const. Art. X, § 10 (A)(1).] The reallocation process of an essential ingredient to the maintenance of a uniform pay plan. The requirement of equal pay for equal work cannot be accomplished unless individual jobs are analyzed to determine

if one job has duties and responsibilities which are sufficiently similar to the duties and responsibilities of another job to warrant equal pay. If the duties of a position have changed over time or if the class specifications have changed or if it comes to the attention of the Director of the Department of State Civil Service that a position may have been improperly allocated, it is the Director's duty to re-evaluate the duties vis-a-vis the class specifications and to reallocate the position into the appropriate class. If the Director does not perform this duty, either of two things will

result: 1) employees performing equal work will end up receiving unequal pay or 2) employees performing unequal work will end up receiving equal pay. Either result violates the constitutional requirement that there be a uniform pay plan. See Thoreson v. Department of State Civil Service, 433 So.2d 184, 195 (La. App. 1st Cir. 1983). Reallocation decisions are made soley on the basis of the duties and responsibilities assigned to a position and have nothing to do with how well an employee performs those duties. Indeed, vacant positions are reallocated frequently. Because the reallocation decision is

independent of an employee's performance of his duties, a reallocation cannot be a disciplinary action.

There are many differences between a reallocation downward and a disciplinary demotion. A reallocation downward can only be made by the Director of the Department of State Civil Service. A disciplinary demotion can only be taken by the employee's appointing authority. A reallocation downward is independent of the quality of the employee's performance of his duties. A disciplinary demotion must be based on the employee's conduct and/or the quality of his work.

If an employee's position is reallocated downward, his pay is not immediately reduced, but rather is frozen for a twenty-four month period or until such time as the pay range for the new position "catches up" to the employee's former rate of pay and with the approval of the Commission, this twenty-four month period can be extended indefinitely. [Civil Service Rule 6.28]. If an employee is demoted for disciplinary reasons, his pay is generally immediately reduced (Civil Service Rule 6.6). The purpose of a reallocation downward is to maintain uniformity in the pay plan. The purpose of a

disciplinary demotion is to punish the employee and to attempt to correct his behavior in the future. For all of these reasons, the Commission concludes that a reallocation downward is not a disciplinary demotion and therefore the procedural requirements for the imposition of a disciplinary demotion which are contained in Civil Service Rule 1.23 are not applicable to reallocations downward. For the same reasons, the Commission concludes that an employee does not have a right to appeal a reallocation downward directly to the Commission.

D. APPEAL OF A REALLOCATION DOWNWARD

The Civil Service Rules prescribe a procedure for an employee to challenge the allocation of his position. Civil Service Rule 5.3(a) provides: "An employee affected by the allocation or reallocation of a position to a class shall be afforded a reasonable opportunity to have his case reviewed by the Director or by a representative whom he designates. The Director's decision shall be final in these matters unless there is an allegation that his ruling has been discriminatory." Additionally, Civil Service Rule

13.10(d) provides for an appeal to the Commission by: "Any person in the Classified Service who shall have failed to obtain relief from an allocation or reallocation of a position to a class or by the Classification Plan or any change thereof after a written request for review thereof by the Director or his representative as provided in Rule 5.3 and who alleges that the Director's decision has been discriminatory." In this appeal, appellants utilized the procedure provided in Civil Service Rule 5.3 twice. The Director based his first decision on a desk audit completed on August 23, 1982.

When his original decision was furnished to counsel for appellants, counsel complained of the original decision and asked that the original decision be vacated. The Director vacated his original decision, ordered a second desk audit and again reviewed the allocations. By letter dated June 9, 1983, the Director advised counsel for appellants that he was again affirming appellants' reallocations to the class of Laborer/Utility. Pursuant to Civil Service Rule 5.3(a). the Director's decision of June 9, 1983, was final. After the Director made his decision, appellants clearly had a right

to appeal to the Commission under Civil Service Rule 13.10(d). However, to perfect such an appeal, the request for appeal must allege that the Director's action was discriminatory and must state, in detail, the facts supporting the conclusion of discrimination. [Civil Service Rule 13.11(d)].

E. DISCRIMINATION

On July 1, 1983, appellants filed an appeal of the Director's decision of June 9, 1983. However, because the current applicability of the Perkins decision had not previously been litigated, it was reasonable for counsel for

appellants to appeal to the Director under Civil Service Rule 5.3 and to appeal to the Commission under Civil Service Rule 13.10 simultaneously. For this reason, to resolve these issues presented herein, the Commission will consider every allegation of discrimination presented in each letter filed herein on behalf of appellants and in the Opposition to the Request for Summary Disposition.

Preliminarily, the Commission notes that appellants allege in detail discriminatory acts of Mr. Cutrer. However, because appellants contend that their duties have remained unchanged, even if Mr. Cutrer

did not like them, Mr. Cutrer's dislike for them could not have had any bearing on the Director's decision to reallocate the positions. A different result would ensue if appellants had alleged that their duties had been deliberately diminished by Mr. Cutrer as a result of his dislike for them or had been deliberately diminished by Mr. Cutrer as a subtrefuge for a disciplinary action. See e.g. Appeals of Gladys M. Rich, Docket Nos. 2010, 2520 and 2614 filed June 3, 1983. Therefore, because appellants have specifically pleaded that there has been no dimunition of their

duties, the Commission concludes that the allegations of discrimination by Mr. Cutrer are not relevant to this appeal. For the same reason, the Department of Health and Human Resources is hereby released as an appellee.

The only allegations of discrimination which are relevant hereto are those against the Director of the Department of Civil Service. These allegations are as follows:

1. . . . the "reallocations" are improper and unlawful because the position was properly allocated

as "Equipment Operator I" and there has been no change in our clients duties or responsibilities. (letter of January 12, 1983, page 1)

2. . . .[the Director's] ruling is discriminatory in the sense that [he] applied a disparate standard in deciding the Director's appeal. [He] rejected on the fact of the pleadings, without a hearing, our contention that the assignments of our clients' positions

have not significantly decreased such as would warrant the initial reallocation. The legal effect of the lack of hearing is that our contention must be deemed to be true at this juncture of the proceedings. Consequently, [his] ruling constitutes a determination that the reallocation was proper in spite of the lack of a decrease in assignments or functions of these employees. At the same time [his] ruling

> would require that there now be some change in assignment from the improper reallocation in order to obtain relief from the improper reallocation, which logic begs the questions of the propriety of the initial reallocation complained of. (Letter of April 8, 1983, page 2; also Opposition to Request for Summary Disposition, page 5.)

Civil Service Rule 13.11(d) provides:

A notice of appeal must

. . .

(d) Contain a clear and concise statement of the actions complained against and a clear and concise statement of the basis of the appeal. Where discrimination is alleged to be a basis for appeal, specific facts supporting the conclusion of discrimination must be alleged in detail. The specific facts required will vary depending on the nature of the appeal; however, the facts must be alleged in sufficient detail to enable the agency to prepare a defense. A

conclusion of discrimination is not sufficient. The types of facts which must be included are:

1. the date, time and place the discriminatory action took place;

2. the name of the person or agency alleged to have taken the discriminatory action;

3. a description of how appellant's action, conduct or performance was the same as that of other persons who were treated differently;

4. the names of other persons treated differently and the dates the different treatment occurred;

5. a description of events, including the dates and circumstances thereof, which led appellant to

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> believe that the adverse decision was based on his religious or political beliefs, sex, race, or any other non-merit factor.

Thus, Civil Service Rule 13.11 recognizes that the facts which must be pleaded will vary according to the nature of the appeal. In an appeal based on reallocation downward, the facts which must be pleaded are those which, if proven, would support a conclusion that the Director's decision was not in furtherance of the uniform application of the pay plan. Necessarily, these facts would include a description of other positions having similar duties and responsibilities which were

allocated to a different class or other positions having dissimilar duties and responsibilities which were allocated to the same class. In this appeal, there are no factual allegations in support of appellants' contention that a disparate standard was applied. No facts are alleged indicating what standard was used in any other reallocation; therefore, there are no facts pleaded which would enable the Commission to conclude that the Director used a different standard in this case. For this reason, the Commission concludes that appellants have failed to perfect an appeal based on

discrimination and therefore, the appeal under Civil Service Rule 13.10(d) must fall. See Mayeux v. Department of State Civil Service, 421 So.2d 948 (La. App. 1st Cir. 1982); Clark v. Department of Transportation and Development, 413 So.2d 573 (La. App. 1st Cir. 1982); Onesta v. Department of State Civil Service, 434 So.2d 1153 (La. App. 1st Cir. 1983).

F. DUE PROCESS

Appellants have alleged that the process by which reallocations are reviewed is violative of due process. The process for reviewing reallocations is established by Civil Service Rules 5.3(a) and

13.10(d). These Rules have the effect of law [La. Const. Art. X, Sec. 10(A)(4)]. As such, so long as these Rules constitute a reasonable exercise of the Commission's rule-making power and do not violate basic constitutional rights, they are entitled to be enforced. See e.g. Young v. Charity Hospital of Louisiana at New Orleans, 226 La. 708, 77 So.2d 13 (1955); Sheldon v. Southeastern Louisiana University, 431 So.2d 437 (La. App. 1st Cir. 1983); Sutton v. Department of Public Safety, 340 So.2d 1092 (La. App. 1st Cir. 1976); Paisant v. University of New Orleans, 391 So.2d 1238 (La. App.1st Cir.

1980); Legros v. Department of Public Safety, 364 So.2d 162 (La. App. 1st Cir. 1978).

The Commission may not be the appropriate forum in which to challenge the constitutionality of its own rules. Compare Clark v. Department of Transportation and Development, 413 So.2d 573 (La.App. 1st Cir. 1982) with Thoreson v. Department of State Civil Service, 433 So.2d 184 (La. App. 1st Cir. 1983). Therefore, in an abundance of caution, the Commission will address the due process argu-ment.

The courts have recognized that no one has a vested right to any given mode of procedure,,

particularly in the area of administrative law. In Hamilton v. Louisiana Health and Human Resources Administration, 341 So.2d 1190 (La.App. 1st Cir. 1976), the court discussed this issue as follows:

> The procedure by which rights may be enforced and wrongs remedied is subject to state regulation and control, and no one has a vested right to any given mode of procedure, provided constitutional requirements of due process (due notice and opportunity to be heard) are observed. Hardware Dealers Mutual Fire Insurance Co. v.

Glidden, 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931); Wall v. Close, 201 La. 986, 10So.2d 799 (1942).

Procedural due process, in its application to the field of administrative law, is generally regarded as being of greater flexibility than it is in its appli-cability and relevancy before a strictly judicial tribunal. See a discussion of this issue in 16A C.J.S. Constitutional Law §628, Page 851, et seq.

Cafeteria Workers, above, interprets Federal due process as follows:

"The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. For 'thought "due process of law" generally implies and includes actor, reus, judex, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings . . . yet, this is not universally true." (Cases cited) The very nature of due process

negates any concept of inflexible procedures universally applicable to every imaginable situation. (Cased cited) '"Due process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded by history, reason, the past course of decisions. . .'. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function

involved as well as the private interest that has been affected by governmental action." [quoting from Cafeteria And Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).]

From the foregoing, it is clear that due process does not necessarily mean a full trial in every instance. Where the constitutional requirements of notice and opportunity to be heard are afforded, due process may be achieved short of a full blown trial

> in the generally accepted sense.
>
> La. Const. 1974, Article 10, Section 10(A), vests the Commission with broad general rule making power for the administration and regulation of the State Civil Service System. The rules adopted and promulgated by the Commission are accorded the force and effect of law. La. Const. 1974, Article 10, §10(A)(4).

Hamilton, supra, at 1193. The foregoing language in the Hamilton decision was quoted with approval in Smith v. Division of Administration, 415

So.2d 381 (La.App.1st Cir. 1982). Thus, the United States Supreme Court has recognized that what constitutes due process must vary depending upon the interests involved.

In this case, the governmental interest involved is the maintenance of the uniform pay plan. The private interests involved are the employee's pay and his potential earning ability. The Commission has attempted to balance these two conflicting interests by developing rules which will allow it to fulfill its constitutionally mandated responsibility to have a uniform pay plan and at the same time,

afford the employee some protection.

These rules are strictly an attempt at a reasonable compromise. If the Commission perceived that the maintenance of a uniform pay plan was of paramount importance, the Commission would have required an immediate reduction in the employee's pay so that his pay would be commensurate with the value of the duties being performed and so that the employee would not be paid more than others performing similar duties. On the other hand, if the Commission perceived that the protection of the employee's pay and potential earning

ability was of paramount importance, the Commission would have allowed the employee to remain in his former (higher) pay range and to continue earning merit increases in that pay range. However, the Commission has done neither.

When an employee's position is reallocated downward, his pay is not immediately reduced. However, his pay is frozen so that he no longer earns merit increases in the former (higher) pay range, but rather earns merit increases in the new (lower) pay range. [See Civil Service Rule 6.28(b).] Additionally, the employee is afforded an opportunity to

challenge a downward reallocation.

The original decision to reallocate a position is made by the Classification and Pay Division of the Department of State Civil Service. After the employee is notified that his position has been reallocated downward, he has the right to file a written request to have the Director review the reallocation. [Civil Service Rule 5.3(a).] If the Director decides that the employee's position should not have been reallocated downward, the original reallocation decision is vacated and the employee has suffered no adverse

consequences. On the other hand, if the Director affirms the original reallocation decision made by the Classification and Pay Division, the Director's decision is final unless the employee files an appeal wherein he alleges and specifically pleads discrimination on the part of the Director [Civil Service Rules 13.10(d) and 5.3(a)], in which case, the employee is afforded an eviden-tiary hearing before the Commission.

The Commission has deliberately not provided an employee with an absolute right to an evidentiary hearing before the Commission on the allocation

of his position. Indeed, in 1972, the constitution was amended to specifically eliminate this right. Compare La. Const. 1921, Art. XIV, Sec. 15 I(b) with 1972. See also La. Const. 1974, Art. X, Sec. 10 (A)(1). By 1972, the Commission had realized that it could no longer maintain the technical expertise necessary to allocate positions. An allocation decision, by its very nature, neces-sitates the comparison of an employee's duties with the class specifications for many classes to determine which class specification best encompasses the duties described. For the allocation decision to further

the uniform application of the pay plan, the person making the allocation decision must know what other types of positions have been allocated to a particular class. An allocation decision is not and cannot be a single isolated decision, but rather, must fit within the entire classification structure. The Director is the logical person to make the final allocation decision because it is he who has developed the class specifications [Civil Service Rule 5.1(a)]; it is he who has daily access to the information concerning the allocation of each of the more than 65,000 positions in state

service; and it is he who can insure that a particular allocation is consistent with the other allocations. The Commission, which is and must be a part time body [See La. Const. Art. X Sec. 3(A)], cannot develop and maintain the in depth knowledge of the two thousand plus class specifications which is necessary to make an appropriate allocation decision.

Thus, the Commission has provided a special procedure for allocation appeals. The employee is provided notice that his position has been reallocated and is afforded an opportunity to have the decision

reviewed by the person who is in the best position to make the allocation decision. An evidentiary hearing is not provided because the relevant facts are undisputed. In the allocation/reallocation process, the only relevant facts are the employee's duties and responsibilities and the contents of the class specifications. By the time an employee asks the Director to review his allocation, the employee has submitted a description of the duties he performs, the employee's supervisor has verified that the duties listed by the employee are actually assigned to the

employee's position, and a desk audit of the employee's job has been conducted. Thus, the employee's duties and responsibilities are undisputed and are documented in writing. The class specifications have already been developed by the Director and approved by the Commission and are also documented in writing. [See Civil Service Rule 5.1] The reasons the employee feels the allocation was improper are contained in the written request for review. All that remains is for the Director to decide which class specification encompasses the duties listed. An evidentiary hearing would serve

no useful purpose under these circumstances.

Once the Director makes his decision, it is final unless the employee appeals to the Commission alleging that the Director's decision was discriminatory and specifically pleads facts which would support a conclusion that the Director's decision was not in furtherance of the uniform application of the pay plan. If the employee does so, he is provided an evidentiary hearing before the Commission.

Thus, the employee who is affected by a downward reallocation is given notice and an opportunity to have his

allocation reviewed by the Director and thereafter, under certain specified circumstances, a right to an evidentiary hearing before the Commission. Additionally, the employee's pay is protected for at least twenty-four months. The Commission concludes that this procedure fulfills the requirements of due process under the circumstances.

G. RULE VIOLATION

Finally, appellants have alleged that the reallocations herein violated Civil Service Rule 1.32 and therefore, they have a right to appeal under Civil Service Rule 13.10(b). Rule 1.32, which is a definition, reads as follows:

"Reallocation" means a change in the allocation of a position from one class to another class wherein the duties of the position have undergone a change. Appellants have alleged that their duties have not decreased and that their reallocations were improper and unlawful because the positions were originally properly allocated to the class of Equipment Operator I and there has been no change in appellants' duties since that time. Appellants have sufficiently pleaded facts in support of their contention that a Civil Service Rule may have been violated and therefore have

a right to appeal on that basis. [Civil Service Rule 13.10(b)].

H. SUMMARY

In summary, the Commission concludes that a reallocation downward is not a disciplinary action and that an employee's right to appeal a reallocation downward is therefore governed by Civil Service Rules 5.3 and 13.10(d). Additionally, an employee would have a right to appeal a reallocation downward if he pleaded specific facts in support of his conclusion that his appointing authority deliberately diminished his duties for any reason not related to the efficient operation of the agency or that

his appointing authority deliberately diminished his duties as a subtrefuge for disciplinary action. Finally, an employee has a right to appeal a reallocation downward, if he alleges that it was the result of a violation of the Civil Service Rules relative to allocations or reallocations of positions.

ORDER

Therefore, this appeal is referred to the merits, limited to a consideration of whether there has been a violation of the Civil Service Rules in this case. The burden of proving that the duties of their positions have remained

unchanged will be on the appellants. If this burden is borne, the burden will then shift to the Director to prove why the positions were reallocated downward. The issue to be resolved by the Commission will be whether the Director's action was in furtherance of the uniform application of the pay plan or whether it was in derogation thereof.

s/ James R. Smith

James R. Smith, Chairman

s/ Watson S. Finister, Jr.

Watson S. Finister, Jr. Vice-

Chairman

s/ A.J. Capritto

A.J. Capritto, Member

s/ James A. Smith

James A. Smith, Member

Commissioners David D. Duggins, Edwin C. Harbuck and Marshall J. Ryals were absent and do not participate.